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IN THE

Supreme Court of the United States

OCTOBER TERM—1970

NO._____

LEE WAY MOTOR FREIGHT, INC.,
Petitioner

vs.

MARCUS JONES, ET AL.,
Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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BRIEF OF MARCUS JONES, ET AL, IN OPPOSITION TO PETITIONER'S WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the District Court (Pet. App. 1a-4a) is reported in 300 F.2d 653. The opinion of the Court of Appeals (Pet. App. 5a-13a) is reported in 431 F.2d 245.

JURISDICTION

The judgment of the Court of Appeals was entered on August 17, 1970. The petition for certiorari was filed on December 16, 1970, Mr. Justice White having extended the time for filing to December 16, 1970. The petition was received by counsel for Marcus Jones, et al, on December 22, 1970. The jurisdiction of this court is invoked under Title 28, U.S.C. §1254 (1).

STATUTES INVOLVED

Sections 703(a), 703(j) and 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C 2000e-2000e-15 are set forth in the Appendix to this brief, infra, pp. 11-12.

QUESTIONS PRESENTED

1. Whether Petitioner's present and continuing consequences of past discriminatory practices are in violation of Title VII of the Civil Rights Act of 1964.

a. By its non-transfer policy freezing an entire generation of Negro employees into discriminatory preferences engaged in before the effective date of Title VII of the Civil Rights Act.

b. By Petitioner's policy of barring Negroes from transferring to a previously all-white job category without showing that its non-transfer policy is necessary to the conduct of its business.

c. By following a policy of prohibiting Negroes to transfer to such previously all-white category when statistical evidence shows that Negroes, because of their race, were previously denied jobs as line drivers reserved for whites only.

STATEMENT

Respondents, four Negroes, instituted this action in the United States District Court for the Western District of Oklahoma complaining that they have been discriminated against in their employment in violation of Title 42, § 2000e-2(a) (§ 703a) of the Civil Rights Act of 1964.

The case was submitted to the District Court upon depositions and a stipulation consisting of Plaintiffs' depositions and that certain witnesses, if produced by petitioner would testify to certain facts. The District Court on January 23, 1969, rendered its opinion denying relief, 300 F. Supp. 653. The Court of Appeals reversed, 431 F.2d 245.

The record undisputedly shows that Petitioner Lee Way Motor Freight, Inc. employed its truck drivers in two distinct categories, line (over-the-road) and city. Line drivers (all white) receive substantially higher wages than city drivers. (Pet. App. 6a). Until the commencement of this action Lee Way had never employed any Negro as a line driver. (Pet. App. 8a) After commencement of this action in August of 1968, Lee Way hired two Negroes as line drivers. (Pet. App. 8a)

On July 1, 1964, Lee Way employed 353 line drivers, all of whom were white. In 1966 and in 1968, Lee Way employed 516 and 542 line drivers, all of whom were white. (Pet. App. 6a)

Traditionally, all Negro drivers employed by Lee Way were classified as city drivers. Respondents herein classified as city drivers, were employed prior to July 2, 1965, the effective date of Title VII. In 1968, Respondents sought transfer to the better paying line drivers posi-

tion. Their requests were denied because of Lee Way's "No transfer" policy, established in 1957, during which time the discriminatory practices prevailed. After such denial, Respondents filed charges of discrimination against Lee Way with the Equal Employment Opportunity Commission, which found that Lee Way's no-transfer policy locked Negro drivers into the jobs to which they were restricted previously in violation of Title VII. (Pet. App. 6a)

Respondents thereafter commenced this action, alleging that Lee Way's no-transfer policy, although it is applied to all city drivers without regard to race, is unlawful because it discriminated against Negro drivers by freezing them into the jobs in which they were restricted previously, when Lee Way filled jobs along racial lines. (Pet. App. 7a)

Lee Way, by way of defense, advanced business reasons for the adoption of the no-transfer policy—contending, that city drivers could not adapt to the line job; insisted that problems arose because separate collective bargaining agreements governed the two jobs; and that such transfers required Lee Way to train City drivers to be line drivers and to train new city drivers. (Pet. App. 6a) The Court of Appeals in reversing the District Court held that the total absence of Negroes showed that line drivers had been previously hired along racial lines stating (Pet. App. 13a):

> "* * * the no-transfer policy, as applied to Plaintiffs, is an unlawful employment practice within the meaning of §2000e-2(a) because it perpetuates past discrimination, by preventing them from now having jobs which were formerly denied to them because of their race, and because it does not satisfy the business necessity test."

ARGUMENT AND AUTHORITIES

Petitioner and Amicus seek to have this court adopt the oft rejected employers' contention that Title VII of the Civil Rights Act does not encompass the present and continuing effect of past discriminations. Persuasive authority has rejected such contention. While it is true that the Act was intended to have prospective application, relief is called for to remedy present and continuing effects of past discrimination. *Local 53 of International Association of Heat & Frost Insulators and Asbestos Workers v. Vogler*, 407 F.2d 1047 (C.A. 5th, 1959), *U. S. v. Local 189*, 282 F.Supp. 39-44 (E. D. La., 1968) aff'd 416 F.2d 980 (5th Cir. 1969), *Quarles v. Philip Morris, Inc.*, 279 F.Supp. 505-516 (E. D. Va. 1968), *U. S. v. Hayes Int. Corp.*, 415 F.2d 1038 (5th Cir. 1969).

Title VII prohibits subtle, complex, as well as simple forms of discriminations. It is well established that employment practices which may not appear to be racially determined, but which, in fact, incorporate and perpetuate pre-Title VII discrimination are unlawful. See, e.g., *Griggs v. Duke Power Co.*, 420 F.2d 1225 (5th Cir., 1970). cert. granted 399 U.S. 926 (1970); *Local 189, Papermakers and Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969), cert. den'd 397 U.S. 919 (1970); *United States v. Electrical Workers (IBEW), Local 38*, 428 F.2d 144 (1970, cert. den'd December 7, 1970; *United States v. Sheet Metal Workers Int'l. Ass'n., Local 36*, 416 F.2d 123 (8th Cir. 1969). Title VII therefore requires elimination of job standards which have the effect of locking Negroes into the position to which they were restricted under prior overtly discriminating practices.

Petitioners' "No transfer policy" imposes on the Negro Respondents the continuation of the pre-existing discrimination. It is precisely such practice that was condemned in *Quarles v. Philip Morris*, 279 F.Supp. 505 (1968). In Quarles, the court condemned a transfer policy that cut off all pre-existing seniority, thus reducing the opportunity for advancement, stating:

> "* * * This method requires the transferee to sacrifice his employment seniority and take new departmental seniority based on his transfer date. Thus a Negro with ten years employment seniority transferring under a note of intent from the prefabrication department to the fabrication department takes an entry level position with departmental seniority lower than a white employee with years less employment seniority. These restrictions upon the present opportunities for Negroes result from the racial pattern of the company's employment practices prior to January 1, 1966. The restrictions do not result from lack of merit or qualification. A transferee under any plan must satisfy ability and merit requirements regardless of his seniority."

In the case at bar it is altogether eliminated. If they quit they cannot even apply for a job as line drivers or anything else. A more classic example of freezing these Negroes on this one job, without opportunity for either advancement or bettering themselves cannot be found.

In Quarles as Petitioners do here, Defendants contended that the present consequences of past discrimination were outside the coverage of the Act. The court in rejecting such contention stated:

> "* * * The defendants rely on legislative history to sustain their thesis; the text of the act does not sup-

port it. The plain language of the act condemns as an unfair practice all racial discrimination affecting employment without excluding present discrimination that originated in seniority systems devised before the effective date of the act."

The law is settled that an employer may not utilize any job qualification procedure which has a discriminatory effect unless the procedure is necessary to the operation of the business. Petitioners did not show and the record is barren of any evidence of any compelling business necessity warranting its qualification procedures established by discriminatory effects on its employment practices. *Local 189, Papermakers and Paperworkers v. United States*, 416 F.2d 980-989 (5th Cir. 1969), cert. den'd 397 U.S. (1970). The opinion of the Court of Appeals conforms to the principles enunciated in Local 189 above.

Neither is there any merit to Petitioners' contention that the use of statistical evidence may not be used to establish violations of Title VII. It is the sum total of the evidence which determines the existence of present continuing past practices of discrimination. Such statistics, coupled with policies that lock in Negro employees in a given classification without opportunity of advancement, regardless of experience and ability are classical methods of racial discrimination. *Turner v. Fouche*, 396 U.S. 346, 360, 90 S.Ct. 532 (1970); *State of Alabama v. United States*, 304 F.2d 583, 586 (5th Cir. 1962), aff'd per curiam 371 U.S. 37 (1962) ("In the problem of racial discrimination, statistics often tell much, and the courts listen."); *United States v. Hinds County School Board*, 417 F.2d 852, 858 (5th Cir. 1969), cert. den'd 90 S.Ct. 612 (1970).

Indeed, in *Parham v. Southwestern Bell & Tele. Co.*, ___ F.2d ___, 3 CCH EPD, 8021 page 690 (8th Cir., 1970) (Violation established by statistics which "revealed an extraordinary small number of black employees"); *United States v. Hayes International Corp.*, 415 F.2d 1038, 1043 (statistical evidence "amply demonstrates a preliminary showing" sufficient to support preliminary injunction); *United States v. Sheet Metal Workers, Local 36*, supra; *United States v. Dillon Supply Co.*, 429 F.2d 800 (4th Cir., 1970). The legislative history of Title VII shows that Congress intended statistical information to be used as evidence of discriminatory practices, 110 Cong. Rec. 7213 (April 8, 1964).

There can be no doubt that the decision of the Court of Appeals with respect to the adequacy of the proof showing a violation of Title VII is consistent with respected authority and Congressional intent. This case does not warrant this court's attention.

Amicus on page 3, note 2 of its brief erroneously states that:

> "It was stipulated that during the two year period preceeding the filing of the suit, Lee Way in addition to 'searching diligently' for qualified blacks to fill over-the-road driver openings, also advertised in newspapers and * * * participated in virtually every community or governmental sponsored program in an effort to correct racial imbalance in its over-the-road driver classification."

There was no such stipulation of fact. It was only stipulated that if the executive vice-president of Lee Way Motor was called as a witness he would testify to certain set out facts. This is a far cry from a stipulation of a fact.

Petitioner and the Amicus brief seek to transform this case into one consisting of "Preferential Treatment" of Negroes. But not so. The Appellate Court clearly held that Lee Way must consider applications for line drivers from Negro city drivers and "judge them by the same standards as all other applicants" (Pet. App. 13a). Obviously this remedial order only required Lee Way to permit objectively qualified Negroes to have an opportunity to transfer to a more desirable job without being shackled to an inherently discriminatory standard.

The Court of Appeals did not hold the present racial imbalance in Lee Way's work force was per se unlawful, nor did it order the imbalance ended. All it did was to insist that present continuation of past discriminatory practices cease. It is crystal clear that this is not a case involving 703(j). Indeed, because of the enormous, uncontrovertible, racial imbalance in Petitioner's work force, even if Plaintiffs succeed in becoming line drivers the effect will be imperceptible. To inject 703(j) into this case would nullify the purposes of the act against continuing effects of past discrimination, *U. S. v. Electrical Workers (IBEW) Local 38*, 428 F.2d at 149, emasculate the heart of the Act and open wide the door to open as well as subtle violations. Petitioner's interpretation of the Act is entirely contrary to the Congressional intention of ending employment discrimination and to the trend of judicial decisions recognizing that it is "the duty of the courts to make sure the Act works, and the intent of Congress is not hampered by a combination of strict construction of the statute and a battle with semantics." *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970). See also, *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 721 (7th Cir. 1969) ("This grant of

authority [under 706(g)' should be broadly read so as to effectively terminate the practice and make its victims whole."); *Rosen v. Public Service Electric and Gas Co.*, 409 F.2d 775, 781 (3rd Cir. 1969).

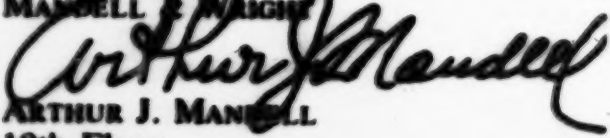
It is clear that the court below acted well within the authority granted to it under Section 706(g) and that the remedy in this case was entirely appropriate. The question does not warrant review by this Court.

CONCLUSION

The opinion of the Court of Appeals is grounded on sound legal principles and recognized authority. It is therefore respectfully prayed that Petitioner's application for a writ be denied.

Respectfully submitted,

MANDELL & WRIGHT



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APPENDIX

Title 42, U.S.C.A., § 2000e-2. *Unlawful employment practices—Employer practices* (703 a)

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 2000e-2. Preferential treatment not to be granted on account of existing number or percentage imbalance. (703 j)

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment agency or labor organization, admitted to member-

ship or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

§ 2000e-5. Injunctions; appropriate affirmative action; reinstatement, hiring, back pay; reduction of back pay by interim earnings or amount earnable; limitations on judicial orders (706 g)

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title.